

Making and Drafting Contracts

Peter Linzer

Fall, 2017

Syllabus

Class meets on Tuesday and Thursday from 4:00 P.M. to 5:30 in BLB 113.

The course book is Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. 2014) (Wolters Kluwer paperback) (“Stark”)

Welcome to the course. It will be some amount of work, but you should come out of this term much better prepared to work transactionally than most lawyers. That alone would not be a big deal. In my opinion, a large percentage of lawyers can’t draft a contract at all. But I hope you will come out much more than just minimally competent and be able to do good work from the moment you start at a law firm.

Some lawyers are superb drafters and negotiators. If you are lucky enough to be working for good drafter, I think you will be able to hold your own – and be in a position to learn from an experienced contracts lawyer.

We have 26 available ninety minute classes, but I will substitute for some of them individual conferences in which we will go over your work on exercises and problems. I view the classes as important, but the least valuable of the various facets of the course. They serve a purpose and I expect you to be prepared and to take an active role in our discussions, in which you and your classmates will go over what you’ve done with the exercises, which we will put on a screen and look at in detail. But your reading of the text and handouts, your actual drafting, your self-critical analysis of what you’ve written, your considering my comments and discussing them with me, and your redrafting in light of all this are much more important. The best way to become a good writer is to write, think, rewrite, and maybe rewrite again.

I will give out four problems during the term, counting, respectively, 15, 20, 30 and 35% of the final grade. I plan to begin with relatively straightforward contracts and move to more specialized ones. (I do not expect to do oil and gas contracts. They are specialized and heavily tied into standard forms that have been construed by courts. We have a separate course in oil and gas contracting, which you may want to take. Energy transactions, of course, are a major part of Houston legal practice.)

As you can see from the schedule below, I plan to give the problems out on a Tuesday with your final draft due a week from the following Thursday. That will give you nine days to write a draft, send it to me, get written comments from me, meet with me when appropriate (before or after you begin drafting) and turn in your final version. We will then typically have a week off, during which time, especially later in the term, we will discuss background for the next problem. I plan to give out the last problem, which will count the most, on Tuesday, November 14, 2017. Our last class is only one week later, on November 21, but I can make the final version due as late as November 27, which would keep it from interfering with your studying for finals, but will burden your Thanksgiving holiday. We can discuss the timing later in the term.

I will sometimes have comments about a day’s readings, if I think they will be of use to you. I will try not just to add to your reading burden.

Here is the syllabus, day by day:

Tuesday, August 22, 2017: Handouts on good writing: George Orwell, *Politics and the English Language*; the opening and closing of the Declaration of Independence; E.B. White's unsigned one paragraph Talk of the Town piece immediately after the Assassination of President Kennedy, *The New Yorker* from November, 1963. These will be on line as part of the First Day Assignments.

None of these is about contract drafting, but good drafting must first of all be good writing. Orwell, the author of *1984* and *Animal Farm*, was himself a first-rate writer and was very concerned with the way the choice of words can affect how we think about an issue. Obviously this is very relevant to contract drafting. Much of his essay is about bad writing, often by prominent writers, but his basic point is that politicians often use vague terms or complicated and obfuscatory constructions to lead us off the point. In the Appendix to *1984* he discusses Newspeak, which the totalitarian government required its subjects to use in place of traditional language. He says that in a relatively short time it would have become impossible to say the portion of the Declaration of Independence that I am asking you to read, except with the one word "crimethink." (The great Justice John Marshall Harlan said much the same thing in *Cohen v. California*, 403 U.S. 15 (1971) (the "Fuck the Draft" case) – that if government can control what words we are allowed to use, it can limit political speech. The words you use in drafting a contract are critical to its meaning and must be carefully chosen.

The opening and closing of the Declaration of Independence are some of the best writing in all American literature, and in the opinion of many, are the bedrock of our nation, even more than the Constitution. It is true that Thomas Jefferson, who wrote that "all men are created equal," owned two hundred slaves. What the Declaration's concepts and its words mean has changed over the centuries, and the opening words can be viewed as aspirational, as for instance, "all men" became ever more inclusive, adding, among others, poor white men, black men, wo-men, and, until recently, at least, immigrants. The closing paragraph was anything but fluff; those who signed the Declaration knew that if we lost the war, they would be hanged as traitors. When they pledged "our lives, our fortunes and our sacred honor," they meant that literally. In contract drafting, we usually want to be literal and precise, but a contract may inspire reliance, not on its exact words but on the relationship it appears to be creating. It's generally better to be precise about the relationship rather than implicit, but both approaches may be present. We'll discuss this throughout the course.

Finally, read E.B. White's paragraph on JFK. Kennedy was killed about 1:00 P.M., Eastern Time, on Friday, November 22, 1963. White, the great essayist (and author of *Charlotte's Web*) was, I believe, living in Maine, and *The New Yorker's* book closed early in the next week. In that pre-email, pre-fax day, White had to recover from the shock the whole nation felt, write his piece and get it by phone or telegraph to *The New Yorker* over that weekend. It was tacked on to other pieces hastily rewritten and, as was *The New Yorker's* style in those days, was unsigned. It is the best paragraph I've ever read. (A note about White's opening: in 1963 most men of a certain age wore hats. (When associates became partners, they bought themselves hats.) But JFK, who was 46 and the President of the United States, went bareheaded. It was symbolic of the generational youthfulness that he projected.)

Read these three pieces, think about them, and come in ready to discuss the use of words, sentences, paragraphs, and unwritten but (mis)understood words (understood by one side, by both sides, by all?).

Thursday, August 24, 2017: Getting started. Stark 1-27. While I don't agree with every word she writes, I think that Professor Stark's book is first-rate. She was a mergers and acquisitions partner in a

Wall Street law firm before teaching the practice of transactional lawyering, first at Fordham, then at Emory in Georgia and Boston University. The book shows her perspective as an M&A lawyer, which is fine, but not the only way. Where I disagree, I'll say so, but I want to emphasize that she is almost always right, that this is a book that you will learn a lot from, and that you'll probably want to keep it as a reference as you begin the practice of law. Feel free to look at her prefaces, pp. xxv-xxviii, though you can skip them if you like. Chapters One and Two, pp. 3-10, give a useful overview, but Chapter Three, pp.11-27, really gets into the substance of the basic idea of translating the business deal the client is interested in into a legally binding agreement.

If you have questions or disagreements with the book, bring them into class. They will help us all to understand the material.

Tuesday, August 29, 2017: Conditions, Discretionary Authority, and Declarations; the Parts of a Contract. Stark 29-56.

In the previous assignment we looked at representations and warranties and covenants, and the rights and duties that spring from them. In today's reading we deal with slightly different but immensely important contract terms that don't exactly create rights and duties but can cause serious problems if they are not phrased correctly and fully understood. This is particularly true of conditions, as you may remember from Contracts, and how discretionary authority is worded can be critical to a successful transaction, perhaps years after the contract is signed. I wasn't familiar with the term "declaration," until I started using Stark, but I think it is a valuable term that crystallizes a statement in a contract that is neither a covenant nor a condition nor a representation or warranty, but is very important and legally binding on both parties, mostly in the interpretation of the other words in the contract.

Chapter Five takes you through the parts of a contract. Many law students have never read a full contract. This gives you a good roadmap of how it would normally be set up.

Thursday, August 31, 2017: First Exercises. Stark 57-63. Normally, I will include exercises with reading assignments, and usually won't assign all the exercises in a chapter. (You will be wise to do some of the unassigned exercises on your own to improve your skills.) For this first run, I have assigned all four exercises, but no reading, so that you will have the time to do a very thorough job on all of them. *Put your work on a flash drive so that we can put part of it on the monitor screen and discuss it in class. I will bring in my work and may have suggestions, but I want the class to do the analysis in the first instance.* We should be able to criticize people's work without being mean-spirited. It's no fun to hear someone suggest that your work isn't the best way to do something, but honest criticism is valuable and is something you should get used to.

Note that Exercise 5-1 sends you to a House Purchase Agreement to use as a "precedent." That's a euphemistic way of referring to a form, and precedents, paradigms or forms are valuable tools for the contract drafter. But it's essential that you realize two things:

- You will usually want to look at someone else's work in the general subject area before starting to draft a contract; clients don't want to pay for your time re-inventing the wheel and the "precedent" can give you a start and function as a check-list of things you should cover in your contract.
- But you should never take the form as gospel. Most form books are terrible, and what you can find on line varies greatly. Some are very well drafted and are up to date on current legal developments in whatever field you're dealing with, but others are filled

with legalese (we'll discuss this soon) or are just wrong, or both. Once you use a form it becomes your work, and if it is bad, you'll have done bad work.

This is your first real work as a drafter. Spend as much time as you need and it deserves. I look forward to seeing what you all produce.

Tuesday, September 5, 2017: Preambles, Recitals and Words of Agreement. Definitions. Stark 65-86, 95-111. These topics are all important, but the most important are the definitions (Chapter Seven). They are difficult and boring to write in your work, and just as difficult and boring to read in someone else's work. But they are the blood vessels of a contract. Every word you write must pass through its definition and the contract may depend on how you defined a word or on your failure to define it. This is equally true when you are reading a contract drafted by someone else.

Thursday, September 7, 2017: The Action Sections; Three Exercises. Stark 117-32. Exercises 6-5 (pp.89-93); Exercise 7-1 (pp. 112-13); (Exercise 8-5 (p. 135). I will hand out Problem One on next Tuesday, September 12, 2017. This assignment puts you in good shape to write a contract, so it makes sense to put effort into both the reading and the exercises. "Action sections" is, I think, a term coined by Stark, though I haven't inquired. It describes what the parties wants done, and is the guts of the contract, why the parties made the deal. "Jones shall deliver the Dog to Smith and Smith shall pay Jones \$5000." (Expensive dog.)

Note that Problem No. 1 will be given out at the end of next Tuesday's (9-12-17) class, but we will have an important, and fairly long, reading assignment for discussion in detail in the class on the following Thursday (9-14-17). You may want to get ahead on the reading so that you will not feel burdened when you have started working on your draft.

Tuesday, September 12, 2017: Representations, Warranties and Covenants. Stark 137-61 (top). You need not write out answers on flash drives to Exercises 9-1, 9-3, and 10-1, but prepare oral answers to them for oral discussion in class. Do mark up corrections to Exercises 9-2 and 10-2 and put them on flash drives.

Problem One will be distributed at the end of this class, returnable in final form on Thursday, September 21, 2017 at Noon, CDT. I will be available for conferences by appointment pretty much each weekday until Problem One is due. I would like you to send me your drafts in advance of meeting with me. *I will give you a special email address for the exchange of drafts.* We will have class on Thursday, September 14, 2017, but not on Tuesday, September 19, 2017.

Thursday, September 14, 2017: Drafting Clearly and Unambiguously: Legalese, Formatting and Sentence Structure. Stark 253-60 (Chapter Eighteen is about Legalese, something I, Professor Stark and every good drafter are death on. Read it carefully.); 263-80 (Chapter Nineteen, on formatting, is valuable, but you can read it fairly quickly, as long as you are aware of what is in it. It is a valuable reference when you are writing.); 287-91 (Chapter Twenty, on sentence structure, is short, but very important); 295-318 (Chapter Twenty-one is about ambiguity and vagueness, which are very important concepts. Read the chapter carefully.)

Feel free to look at and answer the various exercises, but do not feel obliged to do so. *The material in this assignment is critical to writing good contracts.*

All this material is important, but ambiguity is the biggest sin in contract drafting. We use the term to mean something that can have two or more different, and often conflicting, meanings. This can

often (very often) cause problems and lead to litigation, and should always be avoided. Vagueness, on the other hand is sometimes acceptable, but you must be aware that a term is vague before you decide to use it. We use “vague” for something that is indefinable: “good faith,” “fairness,” “justice,” “dusk.” It is possible to give a vague term an artificial definition: “‘dusk’ begins thirty minutes before the daily moment of sunset determined by the United States Weather Service,” but often you may want to leave a term vague. Its use may lead to a jury question, but that risk may encourage both parties to work out compromises on its meaning when the contract is in operation.

Tuesday, September 19, 2017: No class. We will have private meetings with regard to your drafts of Problem No. 1 instead.

Thursday, September 21, 2017: Problem No. 1 is due at Noon, CDT. The Drafting Process, Stark 395-401, 405-20. I realize that a reading assignment for the day a problem is due seems onerous, but we have material to cover and a shrinking calendar. In addition, today’s reading assignment may be useful in your drafting the document needed for Problem No. 1.

Tuesday, September 26, 2017: Conditions to an Obligation; Discretionary Authority; “Will” and “Shall.” Stark 163-90. Exercises 11-1 to 11-3, 11-5, 11-6, 12-1, 14-1, 14-2.

Thursday, September 28, 2017: Endgame Provisions. Stark 191-216. Read all the exercises. We will discuss Exercises 15-1 to 15-3, but you can write out your answers in the spaces in Stark and read them when called upon, rather than reproducing the charts on flash drives. Be prepared to answer Exercise 15-4 orally. Draft on a flash drive your answer to Exercise 15-5.

Tuesday, October 3, 2017: Problem No. 2 will be distributed at the end of class, and will be due at Noon, CDT, on October 12, 2017. Letters of Intent (LOIs). Handout on LOIs as background for Problem No. 2. I will be available for conferences through Wednesday, October 11, 2017.

Thursday, October 5, 2017: Ethical Issues in Drafting. Stark 455-69. Prepare answers to all five exercises for detailed discussion in class. This class’s material may be relevant to Problem No. 2.

Tuesday, October 10, 2017: No class.

Thursday, October 12, 2017: Problem No. 2 is due at Noon. Important Miscellaneous Matters. Stark 325-57. Exercises 21-2, 21-6, 21-8.

Tuesday, October 17, 2017: Some Complex Ideas. Stark 359-76. Exercises 22-1, 22-2, and 25-4.

Thursday, October 19, 2017: Reviewing Contracts. Stark 432-33. There are no exercises in this chapter and it is a short reading assignment. This is, however, an important lawyer’s skill, and we will discuss the exercises closely in class. You can use the skill to review your own work, including Problem No. 2.

Tuesday, October 24, 2017: Problem No. 3 will be distributed at the end of the class and will be due at Noon, CDT, on Thursday, November 2, 2017. (Daylight Savings Time ends on Sunday, November 5, 2017.) Handout of background for Problem No. 3.

Thursday, October 26, 2017: No class. I will be at an American Law Institute meeting on the proposed Restatement of the Law of Consumer Contracts, so I will be unavailable for meetings on Thursday, and possibly on Wednesday, depending on flight schedules. I expect to be back on Friday, October 27, 2017.

Tuesday, October 31, 2017: No class. I will be available for meetings on Monday through Wednesday. You're welcome to come in costume on Hallowe'en.

Thursday, November 2, 2017: Problem No. 3 is due at Noon, CDT. After the Fact Matters: Amendments, Consents and Waivers. Stark 435-45.

I will not assign the additional exercises and exemplars on pp. 473-552. Look them over and use them as you see fit.

Tuesday, November 7, 2017: Boilerplate. Stark 217-51. Exercises 16-1 to -5, 17-1. Our fourth problem will involve a sophisticated contract involving provisions that are commonly used but not well understood. That is a different kind of boilerplate, but we will start with this discussion. Professor Stark made her name academically when she wrote, gathered a bunch of contract pros as contributors, and edited a massive book on boilerplate clauses, Tina L. Stark, *Negotiating and Drafting Contract Boilerplate* (2003).

Thursday, November 9, 2017: Background for Problem No. 4. There will be a handout, probably an article I am working on.

Tuesday, November 14, 2017: Problem No. 4 will be distributed after class. It is due on November 27 at 5:00 P.M., CST. unless we agree on a different due date. Subject to change, if need be, this will be our last class. We will discuss Problem 4 and anything else appropriate.

I will be available to meet privately with you until Problem No. 4 is due.

Thursday, November 16, 2017: No class. See previous entry.

Tuesday, November 21, 2017: Statutory last class, which will not be held unless needed.

HAPPY THANKSGIVING.

Monday, November 27, 2017: Problem 4 is due at 5:00 P.M., CST, unless a change is announced.

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[That's all, folks.]

Peter Linzer